Supreme Court, U.S.
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No. 98-474

In The

Supreme Court of the United States

October Term, 1998

GERALD J. VAN GEMERT and THE LAW OFFICES OF GERALD J. VAN GEMERT, a professional corporation,

Petitioners,

vs.

ANDREW LADICK,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent Andrew Ladick objects to the Question Presented by Petitioners in their Petition for Writ of Certiorari (Petition at page i) and proposes the following Question Presented:

> Does an assessment owed to a condominium association arising from the purchase of a residence qualify as a "debt" within the meaning of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* ("FDCPA")?

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REASONS FOR DENYING THE WRIT

I.

NO SPLIT OF AUTHORITY EXISTS IN THE UNITED STATES COURTS OF APPEALS.

Petitioners Gerald J. Van Gemert and the Law Offices of Gerald J. Van Gemert first argue that a conflict exists among the decisions of the United States Courts of Appeals which have addressed this issue. Petition at 7-11. Petitioners are wrong. There is no split among the circuits.

Two United States Courts of Appeals have addressed the issue of whether a condominium assessment is a "debt" subject to the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* ("FDCPA"). In both cases, the circuit courts have held that such an assessment is a "debt" as defined by the statute.

The Petition for Writ of Certiorari arises from the decision in *Ladick v. Van Gemert*, 146 F.3d 1205 (10th Cir. 1998). The Tenth Circuit most recently concluded "that the condominium assessment owed by Mr. Ladick to his condominium association qualifies as a debt under the FDCPA." *Id.* at 1207. In reaching its decision, the Tenth Circuit relied upon *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir. 1997), (as well as upon *Theis v. Law Offices of William A. Wymana*, 969 F. Supp. 604 (S.D. Cal. 1997)). *Also, see Taylor v. Mount Oak Manor Homeowners Association*, __ F. Supp.__, 1998 WL 312545 (D. Md. May 22, 1998). In *Newman*, the Seventh Circuit held that a condominium assessment, as well as a homeowner's assessment, is a "debt" under the FDCPA. No other circuit court has addressed to question.

The cases which petitioners' cite for a split among the circuits are inapposite here. They do not address the

condominium fee question raised here and instead rely on discredited dicta from *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163, 1165 (3d Cir. 1987), which states that a "debt" must arise from an extension of credit even though there is no such requirement in the statutory definition. *Zimmerman* involved an attempt by video programming services (HBO) to halt microwave "signal 'piracy' in its service areas" through which persons who were not subscribers to the service but who had "a proper antenna and converter can receive the programming without paying for it." Mr. Zimmerman was suspected of being such a signal pirate and received a demand letter which threatened litigation to recover civil damages under the Federal Communications Act of 1984 if he did not agree to terms stated in the letter, including paying a $300 non-negotiable "settlement" figure. *Id.* at 1165-66. Mr. Zimmerman sued under the FDCPA for various violations of the Act. *Id.* at 1167. "The district court found that the defendants demand for $300 represented a settlement offer for potential tort liability and was not a 'debt' within the meaning of the FDCPA," and the Third Circuit affirmed. *Id.*

The Third Circuit examined the definition of "debt" in the FDCPA and focused on the key word "transaction." The *Zimmerman* court concluded:

> While the concept of a "transaction" is broader than that of a contract and may describe negotiations which have been only partly brought to a conclusion, nothing in the statute or legislative history leads us to believe that Congress intended to equate asserted tort liability with asserted consumer debt.

Id. at 1168. To this extent, the *Zimmerman* decision is unremarkable and arguably a correct decision interpreting the definition of "debt" under the FDCPA. Mr. Zimmerman had

never entered into any business relations with HBO and had neither purchased or attempted to purchase anything from them. The result and reasoning to this point affirmed the holding of the trial court and were consistent with the extant case law (*Staub v. Harris*, 626 F.2d 275 (3d Cir. 1980)) and the conclusion of the FTC:

> The term ["debt"] does not include: [u]npaid taxes, fines, alimony, or tort claims, because they are not debts incurred from a transaction (involving purchase of) property . . . or services . . . for personal, family, or household purposes.

53 Fed. Reg. at 50102.

However, *Zimmerman* did not end its discussion with the quoted language, although that holding fully resolved the issue presented. Instead it continued with the following:

> We find the type of transaction which may give rise to a "debt" as defined in the FDCPA, **is the same type of transaction as is dealt with in all other subchapters of the Consumer Credit Protection Act**, i.e., one involving the offer or extension of credit to a consumer. Specifically it is a transaction in which a consumer is offered or extended the right to acquire "money, property, insurance, or services" which are "primarily for household purposes" and to defer payment.

Id. at 1168-69 (emphasis added). The district court decisions cited by defendants adopted this dicta from *Zimmerman* without analysis and held that the lack of an extension of credit removed the debt from those defined by the FDCPA. The Third Circuit in *Zimmerman* offered no explanation for this statement,

conducted no examination of the other chapters of the Consumer Credit Protection Act and did not perceive that its attribution to them of a universal focus on credit transactions is incorrect. While the Truth In Lending Act, 15 U.S.C. §§ 1601 *et seq.*, does require the extension of credit, other chapters of the Consumer Credit Protection Act, *i.e.* — Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 *et seq.*, Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.*, Electronic Fund Transfer Act, 15 U.S.C. §§ 1693 *et seq.* — do not. The *Zimmerman* court also overlooked the FDCPA's definition of "creditor" with its disjunctive distinction between credit extenders and others "to whom a debt is owed". The Third Circuit went beyond its holding disposing of the theft claim to make such a sweeping pronouncement on a matter unnecessary for its resolution of the question presented.

Petitioners also rely on *Azar v. Hayter*, 874 F. Supp. 1314 (N.D. Fla. 1995), *aff'd. without opinion*, 66 F.3d 342 (11th Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 712, 133 L. Ed. 2d 666 (1996).[1] "Unpublished opinions are not considered binding precedent. They may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition, motion or response in which citation is made." Circuit Rule 36-2 of the Rules of the United States Court of Appeals for the Eleventh Circuit.[2] Because the Eleventh Circuit has not published an opinion on this issue, its affirmance without opinion of *Azar v. Hayter*,

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1. Circuit Rule 36-1 of the Rules of the United States Court of Appeals for the Eleventh Circuit authorizes the issuance of an affirmance without opinion in certain circumstances.

2. The Tenth Circuit has taken a similar position: "Unpublished orders and judgments of this court are not binding precedent, . . ." Circuit Rule 36.3 of the Rules of the United States Court of Appeals for the Tenth Circuit.

supra, has no binding effect. Therefore, the Eleventh Circuit has not decided the issue which is presently before this Court. Without an opinion the Eleventh Circuit cannot be considered to be in conflict with the decisions in *Ladick v. Van Gemert*, *supra*, and *Newman v. Boehm, Pearlstein & Bright, Ltd.*, *supra*.

Even if it were assumed that the Eleventh Circuit had taken a position on the question of whether homeowners or condominium assessments are debts within the ambit of the FDCPA that premise is weakened, if not destroyed, by the decision of *Brown v. Budget Rent-A-Car Systems, Inc.*, 119 F.3d 922 (11th Cir. 1997). Therein the Eleventh Circuit rejected the underpinnings of *Azar v. Hayter*, *supra*, and held: "Extension of credit is not a prerequisite to the existence of a debt covered by the FDCPA." 119 F.3d at 924 and n.1. Since *Zimmerman* every United States. Court of Appeals to consider the question of whether an extension of credit is necessary to create a "debt" covered by the FDCPA has held that such an extension of credit is not necessary. *Snow v. Riddle*, 143 F.3d 1350 (10th Cir. 1998); *Duffy v. Landberg*, 133 F.3d 1120 (8th Cir. 1998), *cert. denied*, __ U.S. __ (October 5, 1998); *Brown v. Budget Rent-A-Car Systems, Inc.*, *supra*; *Charles v. Lundgren*, 119 F.3d 739 (9th Cir. 1997); *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322 (7th Cir. 1997). Illustrating its non-binding effect, the *Azar* decision is not mentioned in *Brown v. Budget Rent-A-Car Systems, Inc.*, *supra*, which in any event has invalidated it. Petitioners' citation to *Ritter v. Moss & Bloomberg, Ltd.*, 932 F. Supp. 210 (N.D. Ill. 1996) is also erroneous because this decision was overruled by the Seventh Circuit in *Newman v. Boehm, Pearlstein & Bright, Ltd.*, *supra*.

Both circuit courts that have addressed the question presented are consistent in holding that a condominium assessment is a "debt" under the FDCPA. The five circuit courts that have ruled on the peripheral issue of whether an extension

of credit is a component of the statutory definition have also consistently held that it is not. The two federal district court decisions that are at odds with the holding below are no longer good law within their own circuits. And neither those district court decisions nor the discredited dicta in *Zimmerman* meet the exacting standard established by this Court in Rule 10(a) to warrant the granting of a writ of certiorari. No conflicting decisions exist in the United States Court of Appeals, the Petition for Writ of Certiorari should therefore be denied.

II.

PETITIONERS RAISE AN ARGUMENT WHICH WAS NOT MADE BELOW.

Petitioners' second argument for granting their Petition for Writ of Certiorari is that by application of the Tenth Circuit's decision the FDCPA preempted California's Davis-Stirling Enactment regarding common interest developments and thereby violated the Tenth Amendment to the United States Constitution. Petition at 13-15. While petitioners did discuss the California's Davis-Stirling Enactment below, this argument was not presented to the Tenth Circuit. Arguments may not be raised for the first time in petitions for writ of certiorari to the United States Supreme Court. *Sisson v. Ruby*, 497 U.S. 358, 359 n.1 (1990); *City of Canton v. Harris*, 489 U.S. 378, 386 n.5 (1989); *United States v. Ortiz*, 422 U.S. 891, 898 (1975).

Furthermore, the findings and purpose of the FDCPA articulate the reasons for its enactment.

> (a) There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of

personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

15 U.S.C. § 1692. For these reasons it is appropriate for the FDCPA to provide consumers with greater protections than California's Davis-Stirling Enactment.

CONCLUSION

Both United States Courts of Appeals which have addressed this issue have concluded that a condominium assessment fee is a "debt" within the coverage of the FDCPA. Thus, there is not a split or conflict among the circuits, and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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